

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$12,527.93 for the period October 1, 2012 to December 7, 2019 for which she was not at fault, because she concurrently received FECA wage-loss compensation benefits and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On May 11, 2001 appellant, then a 54-year-old art therapist, filed a traumatic injury claim (Form CA-1), alleging that on May 8, 2001 she injured her head, face, and cervical spine while in the performance of duty. She explained that, as she bent down by a door to pick up a dropped item, a student slid into the other side of the door, causing the door to slam into her face. Appellant stated that she sustained a head concussion, a hematoma, a cervical strain, and a possible cervical fracture. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on May 8, 2001. OWCP accepted the claim for head concussion and cervical strain and paid appellant wage-loss compensation on the supplemental rolls beginning December 2, 2001 and on the periodic rolls beginning August 11, 2002.

On December 5, 2019 OWCP sent a Federal Employees Retirement System (FERS)/SSA dual benefits calculation form to SSA.

On December 13, 2019 SSA completed the FERS/SSA dual benefits calculation form. The form indicated that, as of October 2012, appellant's SSA rate with FERS was \$781.50 and without FERS was \$644.00, beginning in December 2012 her SSA rate with FERS was \$794.70 and without FERS was \$654.90, beginning in December 2013 her SSA rate with FERS was \$806.60 and without FERS was \$664.70, beginning in December 2014 her SSA rate with FERS was \$820.30 and without FERS was \$675.90, beginning in December 2015 her SSA rate with FERS was \$820.30 and without FERS was \$675.90, beginning in December 2016 her SSA rate with FERS was \$822.70 and without FERS was \$677.90, beginning in December 2017 her SSA rate with FERS was \$839.10 and without FERS was \$691.40, beginning in December 2018 her SSA rate with FERS was \$862.50 and without FERS was \$710.70, and beginning in December 2019 her SSA rate with FERS was \$876.30 and without FERS was \$722.00.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the January 28, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

In a December 19, 2019 letter, OWCP explained to appellant that she had been receiving SSA age-related retirement benefits earned as a part of the FERS retirement package. It related that the portion of SSA age-related retirement benefits earned as part of the FERS retirement package and the receipt of FECA benefits concurrently was a prohibited benefit. Therefore, appellant's FECA benefits would be adjusted based on the FERS portion of SSA benefits attributed to federal service. OWCP advised appellant that her 28-day FECA compensation after the SSA offset would be \$1,345.57.

A fiscal pay rate memorandum dated December 19, 2019 related that, during the period October 1 through November 30, 2012, appellant received an overpayment of \$276.51 from December 1, 2012 through November 30, 2013, an overpayment of \$1,682.21 from December 1, 2013 through November 30, 2014, an overpayment of \$1,707.48 from December 1, 2014 through November 30, 2015, an overpayment of \$1,737.56 from December 1, 2015 through November 30, 2016, an overpayment of \$1,742.32 from December 1, 2016 through November 30, 2017, an overpayment of \$1,742.37 from December 1, 2017 through November 30, 2018, an overpayment of \$1,777.27 from December 1, 2018 through November 30, 2019, an overpayment of \$1,826.60, and from December 1 through 7, 2019 an overpayment of \$35.61. The total overpayment was found to be \$12,527.93.

On December 19, 2019 OWCP issued a preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$12,527.93 because it paid her compensation benefits for the period October 1, 2012 through December 7, 2019 that had not been reduced by the portion of her SSA age-related retirement benefits attributable to her federal service. It further advised that she was without fault in creating the overpayment because she could not have reasonably known that an improper payment occurred due to the complexity in benefits administration. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing. No response was received.

By decision dated January 28, 2020, OWCP finalized its preliminary overpayment determination that appellant had received an overpayment of compensation in the amount of \$12,527.93 for the period October 1, 2012 through December 7, 2019 because a portion of her SSA age-related retirement benefits was based on credits earned in federal service, resulting in a prohibited dual benefit. It further found that she was without fault in the creation of the overpayment, but denied waiver of recovery because there was no evidence to substantiate that recovery would defeat the purpose of FECA or be against equity and good conscience. OWCP required recovery of the overpayment by deducting \$100.00 from appellant's continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of

duty.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.<sup>6</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,527.93 for the period October 1, 2012 through December 7, 2019, for which she was without fault, because she concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without an appropriate offset.

The record indicates that while appellant was receiving FECA wage-loss compensation benefits she was also receiving SSA age-related retirement benefits attributable to her federal service. As noted, a claimant cannot receive both compensation for wage loss and SSA age-related retirement benefits attributable to federal service for the same period.<sup>8</sup> Consequently, fact of overpayment has been established.

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to appellant's federal service. SSA provided the SSA rates with FERS and without FERS for the period October 1, 2012 through December 7, 2019. OWCP provided its overpayment calculations for each relevant period based on the SSA worksheet in its December 19, 2019 preliminary overpayment determination.

The Board has reviewed OWCP's calculation of benefits received by appellant for the period October 1, 2012 through December 7, 2019 and finds that an overpayment of compensation in the amount of \$12,527.93 was created.<sup>9</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>7</sup> FECA Bulletin No. 97-09 (February 3, 1997); *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

<sup>8</sup> *Id.*

<sup>9</sup> *S.O.*, Docket 20-0753 (issued October 28, 2020).

## **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”<sup>10</sup> Section 10.438 of OWCP’s regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>11</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the \$12,527.93 overpayment of compensation.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>12</sup> Appellant, however, had the responsibility to provide the appropriate financial information and documentation to OWCP.<sup>13</sup>

In its preliminary overpayment determination dated December 19, 2019, OWCP clearly explained the importance of providing the completed Form OWCP-20 and financial information, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support reported income and expenses. It advised appellant that it would deny waiver of recovery if she failed to furnish the requested financial information within 30 days. Appellant did not submit a completed Form OWCP-20 or otherwise submit financial information regarding monthly income and expenses. As a result, OWCP did not have the necessary financial information to determine if recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience.<sup>14</sup>

Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP’s regulations to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment.<sup>15</sup>

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<sup>10</sup> 5 U.S.C. § 8129.

<sup>11</sup> *Id.* at § 10.436

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at § 10.438.

<sup>14</sup> *See S.M.*, Docket No. 17-1802 (issued August 20, 2018).

<sup>15</sup> *Supra* note 11.

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>16</sup> Section 10.441(a) of the regulations 33 provides:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

As noted, appellant did not complete the Form OWCP-20, nor did she submit financial information as requested prior to the final January 28, 2020 decision. The overpaid individual is responsible for providing information about income, expenses, and assets as specified by OWCP.<sup>18</sup> When an individual fails to provide requested financial information, OWCP should follow minimum collection guidelines designed to collect the debt promptly and in full.<sup>19</sup> As appellant failed to timely submit information to OWCP as requested, the Board finds that there is no evidence of record to demonstrate that it erred in requiring recovery of the \$12,527.93 overpayment of compensation at the rate of \$100.00 every 28 days from her continuing compensation payments.<sup>20</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$12,527.93 for the period October 1, 2012 through December 7, 2019, for which she was without fault, because she concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits without an appropriate offset. The Board further finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery

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<sup>16</sup> 20 C.F.R. § 10.441(a).

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* note 11.

<sup>19</sup> *T.J.*, Docket No. 19-1242 (issued January 13, 2020).

<sup>20</sup> *Id.*

of the overpayment by deducting \$100.00 every 28 days from appellant's continuing compensation payments.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 28, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 7, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board